MIDDLETOWN RANCHERIA
OF POMO INDIANS OF CALIFORNIA

TRIBAL COUNCIL

July 20, 2018

Via Electronic Mail to CEQA.Guidelines@resources.ca.gov

Mr. Christopher Calfee
Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Comments to Proposed Amendments to the California Environmental Quality Act Guidelines, OAL Notice No. Z-2018-0116-12

Dear Mr. Calfee:

The Middletown Rancheria of Pomo Indians of California ("Tribe") appreciates the opportunity to comment on the proposed amendments to the California Environmental Quality Act (CEQA) Guidelines. The enclosed comments are submitted on behalf of the Middletown Rancheria, a federally recognized and sovereign Indian tribe.

As a general matter, we are concerned that the proposed amendments to the CEQA Guidelines are setting a low bar as the minimum requirements of the CEQA rather than encouraging public agencies to provide more tribal involvement in the review process and greater environmental protections as they implement the CEQA. The CEQA must be interpreted to provide the fullest possible protection to the environment consistent with statutory mandates including without limitation protection of tribal cultural resources.[1] Many of the proposed amendments to the CEQA Guidelines appear to further dismantle CEQA and conflicts with the purpose and intent of Assembly Bill 52 (AB 52) and Senate Bill 18 (SB 18) creating numerous problems for lead and responsible agencies increasing the risk for additional litigation.

Further, the amendments process of the CEQA Guidelines fails to sufficiently address tribal concerns, and involved little outreach and engagement of interested tribes and tribal stakeholders. Notably missing from the voluminous proposed amendments to the CEQA Guidelines "package," released by the California Natural Resources Agency on January 26, 2018, are consideration of tribal cultural resources and applicable statutory and regulatory provisions for identification and protection of such resources. As such, we urge the California Natural Resources Agency to extend the comment period on the proposed amendments to the

[1] See *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 259 (1972).

CEQA Guideline for at least another thirty (30) to sixty (60) days to allow for meaningful participation and input from tribes. The proposed amendments are extensive and require time for proper review and comments to the hundreds of pages of "package" materials and information released since January 26, 2018. Extending the public comment period will also serve the State's interest in receiving comments that will identify issues and offer recommendations to support the objective to update the Guidelines which results in "a smoother, more predictable process for agencies, project applicants, and the public."

The following comments focus on the Thresholds of Significance, Mitigation Measures, Tiering, Emergency Exemptions, Exemption for Existing Facilities, and Discretionary Projects which could create internal inconsistency in the CEQA Guidelines, and undermine the implementation of AB 52 and protection of Tribal Cultural Resources.

I. Sections 15064 and 15064.7 Should Be Amended to Require Adoption of and/or Include a Clear Process for Meaningful Tribal Consultation.

The proposed amendment adds subsection (b)(2) to Section 15064 of the CEQA Guidelines which provides that an agency may use "thresholds of significance" as amended in Section 15064.7, to "assist lead agencies in determining whether a project may cause a significant impacts." The proposed amendment of Section 15064.7 permits the lead agency to adopt thresholds of significance for use on a case by case basis, and allows existing regulatory standards to be used as thresholds of significance. Viewed together, the proposed amendment to Sections 15064 and 15064.7 expressively provide that lead agencies may use thresholds of significance in determining significance, and that regulatory standards may be used as thresholds of significance. This is problematic for purposes of tribal cultural resources as thresholds use may be biased by archaeological standards and assessments, and create the potential for litigation regarding tribal cultural resources contrary to the intent of AB 52 to ensure that the identification and assessment of project impacts on tribal cultural resources include meaningful consultation and consideration of tribal values. Thus, the Guidelines should be modified to require adoption of and/or include a clear process of meaningful tribal consultation with tribes on the development or use of any thresholds of significance.

II. Section 15126.4 Should Only Allow Deferral of Mitigation Details if it is Infeasible to Provide After Meaningful Consultation with Tribes.

The proposed amendment to Section 15126.4 allows the lead agency to defer "specific details" of mitigation measures when it is "impractical or infeasible" to include details during the project's environmental review. It is important that mitigation measures be specified during the environmental review process to allow the lead and responsible agencies to make accurate

findings as to whether there are feasible options to avoid or substantially lessen project impacts.[2] The Tribe is concerned with deferral of mitigation details as it often results in deferral of significant aspects of a mitigation measure necessary for the proper identification of culturally appropriate mitigation.[3]

We have experienced agency confusion with respect to attempts to defer meaningful consultation to discuss feasible culturally appropriate mitigation under the pretext that identification and mitigation of tribal cultural resources are too costly and difficult and thus "impractical" prior to project approval. Archaeological preservation and mitigation methodologies are frequently used improperly in establishing performance standards for mitigation of impacts to tribal cultural resources. Often times the resources are assessed in terms of scientific significance criteria *only*. Under AB 52, identification of tribal cultural resources requires the consideration of the tribal value of the resources. We have had to challenge agencies assigning archaeologist to assess the presence of tribal cultural resources, something they are simply not qualified to do as they cannot define the inherent tribal values of the resources. Tribes possess the expertise and information about their resources, its value and significance. Therefore, tribal input and participation must be sought and considered early in the development of any mitigation measure without deferral to post project approval which makes meaningful consideration of avoidance such as project redesign or other feasible culturally appropriate mitigation unlikely. Deferring meaningful tribal cultural resource identification, avoidance and mitigation to project level review creates the potential for costly litigation and project delays, and is contrary to the legislative intent of AB 52 and SB 18.

The Tribe request that Section 15126.4, subdivision (a)(1)(B) be modified to add clarifying language that in the event the detailed description of a mitigation measure is deferred, performance standards or criteria adopted in lieu thereof shall be as specific as possible, not just presented as generalized goals. In addition, Section 15126.4(a)(1)(B) should be amended to delete the phrase "impractical or". Infeasibility is defensible when employing CEQA's definition of "feasible" and the CEQA case law, whereas "impractical" is vague and open to abuse. Further, if after meaningful consultation with the Tribe, the agency determines that mitigation details cannot be specified, the agency should explain the reasons underlying such determination in the Environmental Impact Report (EIR) and commit to ongoing consultation and mitigation planning agreement with the Tribe as a condition of project approval. Thus, we also suggest adding language to Section 15126.4 to provide that the EIR shall explain the reasons underlying the agency's determination and describe how the mitigation and performance standards will be refined and how it will be effective.

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[2] Pub. Res. Code § 21061. It is the policy of California that EIR's and other documents required by CEQA "be organized and written in a manner that will be meaningful and useful to decisionmakers and to the public." Pub. Res. Code § 21003(b).

[3] See e.g., *Madera Oversight Coalition v. County of Madera*, 199 Cal.App.4th 48 (2011), overruled in part on other grounds.

III. Amendments to Section 15152 and 15168 Should Include Notice to Tribes Whether the Tiering is Determined Compliant with AB 52 Mandates.

The Tribe's foremost concern with the proposed amendment to Section 15152 and 15168 relates to the permitted tiering of documents and analysis that inadequately considers tribal cultural resources or are otherwise not compliant with AB 52. Tiering often results in utilization of an inaccurate baseline for analyzing impacts to tribal cultural resources in violation of the CEQA. This is an existing problem that would only get worse if tiering is made easier without specific guidelines on tiering and AB 52 mandates. Prior to the adoption of AB 52, tribal cultural resources were often inappropriately evaluated solely in terms of scientific or historical significance criteria without consideration of the tribal value of the resource. Proper consideration of tribal cultural resources consistent with the intentions and mandates of AB 52 requires early consultation on the identification and proper consideration of significance and mitigation analysis with interested tribes prior to project approval. Therefore, we request that language be added to provide that if an agency chooses to tier off of a document or analysis prepared prior to July 1, 2015, the effective date of AB 52, that tribes shall be provided a notice of preparation of subsequent document or a notice of the agency's determination describing how the base tiering documents and analysis satisfies AB 52 mandates. Additionally, guidance regarding tiering and AB 52 compliance should be developed to ensure consideration and protection of tribal cultural resources.

Please see related comments and discussions under section II of this letter above.

IV. Section 15269 Should be Amended to Ensure that the Expansion of the Emergency Exemption does not Exceed the Definition of Emergency.

The proposed amendment to Section 15269 of the CEQA Guidelines would expand the CEQA exemption for emergency projects to include "emergency repairs...that require a reasonable amount of planning to address an anticipated emergency." This expansion is vague and overbroad, and appears inconsistent with the definition of emergency. The CEQA defines "emergency" as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services."[4] If there is planning involved, the presumption should be that environmental review could be conducted.

Emergency response actions can cause extensive damage and destruction to tribal cultural resources. The Middletown Rancheria has worked with federal, state and local agencies on many emergency management and recovery activities such as the 2015 Valley Fire, 2016 Clayton Fire and recent Napa fires (not official name) emergency recovery and management related activities and projects. We have established and continue to establish mechanisms with

[4] CEQA Guidelines § 15359.

the agencies for the protection and treatment of tribal cultural resources potentially impacted and found in conjunction with such emergency projects. It has been mutually beneficial for the Tribe and the agencies to cooperate to ensure adequate consultation, collaboration and tribal monitoring of activities in conjunction with emergency recovery and management, and activities in the planning areas. Such partnership utilizes established processes and resources of the agency and the Tribe to expedite cultural resources protection and treatment related to emergency management and recovery activities. We are concerned that the proposed amendment would undermine such efforts if aggressively used.

The Tribe request that the proposed amendment be eliminated, or at least clarified to ensure that it is consistent with the definition of "sudden, unexpected occurrence" where there is an imminent risk of the emergency occurring at the site at issue. Otherwise, the intention of the emergency provision could be subverted to justify exemption of CEQA requirements for repair projects whether there is a serious threat or not, and create a potential end run around tribal consultation and consideration of tribal cultural resources.

Furthermore, there is often agency confusion and lack of understanding with regard to the jurisdiction of the Native American Heritage Commission (NAHC) which is not part of the CEQA. Thus, we also request that references be added to the CEQA Guideline to clarify that even if a project is exempt from CEQA requirements, the project may contain properties or features (e.g., burial sites, sacred sites, funerary items) that falls under the jurisdiction of the NAHC which compliance remains applicable.

V. Section 15301 Should be Revised to Exclude Former Uses from the Exemption for Existing Facilities.

The proposed amendment to Section 15301 of the CEQA Guidelines would expand the categorical exemption to include "former" use of an existing facility. The proposed amendments contradict and violate CEQA by expanding the language of the existing facilities exemption. Well-established case law holds that exemptions shall be construed narrowly and may not be expanded beyond their terms or CEQA's statutory purpose.[5] Allowing an exemption to be based on a prior condition ignores this important requirement of CEQA and circumvents necessary environmental review. For example, a vacant or unused facility or feature located on or near a sacred site of the Tribe being proposed for increased or expanded use may not have been adequately assessed for impacts to tribal cultural resources. The exemption of such project would undermine CEQA's requirements to establish existing conditions and identify and mitigate a proposed project's impacts on those existing conditions. Thus, the reference to "former" use should be eliminated from this proposed amendment.

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[5] See e.g., *County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 931, 966 (1999); *Azusa Land Reclamation v. Main San Gabriel Basin Watermaster*, 52 Cal.App.4th 1165, 1192 (1997).

Please see comments related to our concerns with exemption from CEQA review under section IV of this letter above.

VI. "Discretionary Project" Should be Revised to Exclude "Other Fixed Standards" From its Exception.

The proposed amendment to Section 15357 creates an exception to the definition of a "discretionary project" and vastly expands the definition of "ministerial" projects for which no environmental review is required. The existing language contrasts a discretionary project requiring agency approval and CEQA review to "situations where the public agency or body merely has to determine whether there has been conformity with applicable *statutes, ordinances, or regulations*." The proposed amendment adds the undefined term, "or other fixed standards." Thus, the proposed amendment would enable agency approval with no CEQA review of a project where the agency claims conformity with "other fixed standards." The Tribe request that reference to "or other fixed standards" be eliminated from this proposed amendment.

Please see related comments and discussions with regards to exemption under sections IV and V of this letter above.

VII. Recommendations.

Based on the foregoing comments and concerns, the following recommendations are provided:

1. Extend the comment period on the proposed amendments to the CEQA Guideline for at least another thirty (30) to sixty (60) days to allow for meaningful participation and input from Tribes.
2. Modify the Guidelines to require and include a clear process of Tribal Consultation with Tribes on the development or use of any "thresholds of significance."
3. Add language to the Guidelines to require that in the event an agency chooses to tier off of a document or analysis prepared prior to July 1, 2015, the effective date of AB 52, that interested tribes shall be provided a notice of preparation of subsequent document or a notice of the agency's determination describing how the base tiering documents and analysis satisfies AB 52 mandates.
4. Guidance regarding tiering and AB 52 compliance should be developed to ensure proper identification, consideration and protection of Tribal cultural resources.
5. Eliminate the proposed amendment expanding CEQA exemption for emergency projects, or at least clarify such provision to ensure consistency with the definition of "emergency," and limit its application to serious emergency repair projects that qualifies as a "sudden, unexpected occurrence."

6. Add language to the Guidelines to clarify that activities or projects exempt from the CEQA requirements may contain properties or features (e.g., burial sites, sacred sites, funerary items) that falls under the jurisdiction of the NAHC which is separate from the CEQA review and remains applicable.
7. Eliminate "former" use from the exemption for existing facilities.
8. Eliminate "or other fixed standards" from the definition of "discretionary project."

We urge the California Natural Resources Agency and Office of Planning and Research to modify its proposal consistent with the recommendations set forth in this letter.

Considering the essence of time, we addressed our concerns generally. This letter does not purport to exhaustively set forth the Tribe's entire position in the above referenced matter. This letter is without prejudice to any rights and remedies of the Tribe, all of which are expressly reserved.

Respectfully,

Jose Simon III
Tribal Council Chairman
Middletown Rancheria of Pomo Indians
Of California